SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1968
No. 764

SP4 BRADISH G. MORSE, ER 15 729 742, *et al.*,
Petitioners,

vs.

COLONEL CHARLES B. BOSWELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Reply to Respondents' Brief in Opposition to the Petition.

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ARGUMENT.

1. On the question of violation of contract rights raised herein, Respondents place questionable reliance in their Opposition Brief (pp. 5, 6) on *Winters v. United States,* 281 F. Supp. 289 (E.D.N.Y.), affirmed *per curiam,* 390 F. 2d 879 (C.A. 2), certiorari denied, October 14, 1968, No. 263 Misc., this Term.

Denial of certiorari in *Winters* does not justify the conclusion that this Court has thereby previously rejected the contention made herein that the phrase in 10 U.S.C. §673, "or when otherwise authorized by

law", refers only to laws in existence at the time petitioners signed their enlistment agreements and does not cover laws subsequently enacted.

The controlling issue in *Winters* was whether the Commandant of the Marine Corps was authorized to change drill attendance requirements for reservists. Accordingly, it appears that the portion of District Judge Dooling's opinion in *Winters* quoted at page 6 of Respondents' Brief was dictum. Therefore, denial of certiorari in *Winters* does not necessarily indicate acceptance by this Court of the reasoning of Judge Dooling in the quoted section of his opinion.

On that basis, this Court may well determine that preference should be given on constitutional grounds to the reasoning implicit in the original judgment in *Gion v. McNamara*, Civil No. 67-1563-EC (C.D. Cal., Jan. 1968).[1] It is to be noted that "the force of the reasoning" of *Gion* persists under the doctrine of *stare decisis*, whether or not the original judgment in that case remains vacated on the grounds of mootness. See, *e.g.*, *United States v. Wolfe*, 232 F. Supp. 85, 101.

Judge Dooling's reasoning is an attempt to justify the unilateral changing of a government contract on the ground that such is permissible to avoid "fettering" an agency of the government. Such reasoning overlooks constitutional prohibitions. *Perry v. United States*, 294 U.S. 330; *Lynch v. United States*, 292 U.S. 551. *Cf.*, *Bell v. United States*, 366 U.S. 393, and *Smyth v. United States*, 302 U.S. 329.

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[1]Notice of appeal to the United States Court of Appeals for the Ninth Circuit has been filed by the petitioner in *Gion v. McNamara, supra*, from a district court order entered on November 27, 1968, vacating its original judgment on the ground of mootness (See Pet. 7, footnote 3).

2. Newly discovered evidence is here offered to support the contention that the enlistment agreements were intended by the parties thereto to be governed by law existing at the time of enlistment and were not to be subject to unilateral legislative changes in the future. That evidence consists of the language contained in Chapter 1 of Army Regulation 135-90 which defines the contractual service obligation of Army reservists. That language, quoted below from the regulation in its form as of October 1968, is basically unchanged from that found in the regulation since May 1962.

Paragraph 1-3 ("Explanation of terms"), section d. ("Service obligation"), subsection (2) reads:

> "Contractual.
>
> "(a) An obligation to serve on active duty or in a Reserve status or both, for a stated period, voluntarily assumed by enlistment or acceptance of appointment and signing of an agreement *in accordance with the provisions of law and regulations applicable at the time of enlistment or appointment.*" (Emphasis added).

As this Court has frequently stated, "authorized War Department regulations have the force of law". *Standard Oil Co. v. Johnson,* 316 U.S. 481, 485. Accordingly, the quoted provisions of AR 135-90, in effect when petitioners executed their enlistment contracts, were incorporated therein by reference. See, *e.g., Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 435. Viewed in this light, the enlistment contracts contained no ambiguity as to the law which the parties intended to apply; the court below erred in construing contract language contrary to the clear intent of the parties.

3. Respondents argue (Footnote 3, Resp. 6) that certain express language in the enlistment agreements authorized the call to active duty. This begs the question, for only after the statutory language of 10 U.S.C. §§262, 263, 672, and 673 has been construed can pertinent meaning be given to such terms as "mobilization" and "emergency". Petitioners contend that "emergency" means a national emergency declared by Congress or the President and that "mobilization" occurs pursuant only to a declared war or emergency.

In this regard, the following phrase contained in the Oath of Enlistment which appears in the "Enlistment Record" should be noted:

> ". . . do hereby acknowledge to have voluntarily enlisted *under the conditions prescribed by law. . . .*" (Emphasis added).

Petitioners contend that this express language in the enlistment agreement should be construed to refer to existing law, not future law, for the same reasons relating to the pertinent statutory language.

4. Respondents argue (Resp. 7) that the authority given to the President by Public Law 89-687 to order reserve units to active duty "when he deems it necessary" involves the exercise of executive power as Commander-in-Chief and not legislative power. If that were true, there would be no purpose in enactment of that law or any prior statute by which Congress, in the exercise of its exclusive power to raise armies, purports to authorize the President to activate reservists under specified conditions. The fact is that the President may exercise his powers as Commander-in-Chief only after Congress has raised the armies.

5. Respondents completely overlook the contention (Pet. 15) that if the Department of the Army's order activating petitioners exceeded its authority, then said order was void *ab initio*. If this view is upheld by this Court, then the relief sought in the present complaint will be granted.

Further, all of the petitioners (not merely some of them) are affected by the denial of credit for previous active duty service. Requiring them to raise the issue at a later date would result in the issue being mooted without the possibility of relief because of the passage of time during the process of litigation.

6. Respondents argue in support of the district court's holding that "rational differences in treatment of units and individuals are clearly not violations of (equal protection) concepts". Petitioners here point to the view of Mr. Justice Douglas that "units" are made up of "individuals", so that the discrimination is in fact as between individuals (Pet. App. 30).

Also, as Mr. Justice Douglas has observed (Pet. App. 32), ". . . a unit, of course, can serve 24 months even though its original members, having already served some time, are sooner discharged".

7. Denial of certiorari in *McArthur v. Clifford,* No. 613, this Term, should not deter granting of the writ in the instant matter because the reason for denial in that case need not pertain hereto. It is to be noted that several issues raised in the *McArthur* petition are not raised here, and *vice versa.* Further, the *McArthur* petition was filed in questionable form and under procedural circumstances differing from those in the instant matter.

Conclusion.

For the foregoing reasons, and for all of the reasons previously presented by petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 10, 1969.